

EN

Case No
COMP/M.5171 -
Enel/ Acciona/
Endesa

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 7(3)
Date: 28-04-2008



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 28-04-2008

SG-Greffe (2008)
D/201995/201996

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

To the notifying parties

Dear Sir/Madam,

**Subject: Case No COMP/M.5171 - Enel/ Acciona/ Endesa
Request for a derogation pursuant to Article 7 (3) of Council Regulation No 139/2004**

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of Council Regulation (EC) No 139/2004 ("EC Merger Regulation") with regard to the proposed acquisition by Enel SpA ("Enel", Italy) and Acciona S.A. ("Acciona", Spain) of joint control of Endesa S.A. ("Endesa", Spain), submitted pursuant to Article 7(3) of the EC Merger Regulation on 17 April 2008.

I. THE PARTIES

2. Enel is an Italian electricity operator, active in the generation, distribution and supply of electricity, mainly in Italy, where it is the main provider of electricity to both domestic and industrial users and also in Spain, Bulgaria, Romania, Slovakia, Russia, France, and North and South America. It is also active in the purchase and sale of natural gas for domestic electricity generation and gas operations in Italy where Enel is the second operator in the gas distribution and supply business.
3. Acciona is a corporate group primarily based in Spain whose main lines of business are the development and management of infrastructure and real estate projects, the provision of transport, urban and environmental services, and the development and operation of renewable energies.
4. Endesa is a Spanish electricity operator that is also active in other European countries (though to a limited extent), in particular: Portugal, France, Italy, Germany and Poland. In addition, Endesa is active in South America and North Africa. In Spain, Endesa is also present in the gas sector. Endesa's shares are listed on the Madrid and the New York Stock Exchange.

II. FACTS AND PROCEDURE

5. On 26 March 2007 Enel and Acciona agreed to acquire joint control of Endesa by launching a joint public bid for the shares in Endesa that they do not already own or control. In a parallel operation that does not have Community dimension and will therefore be examined by the Spanish competition authorities, Acciona will acquire sole control over Endesa's renewable energy business.
6. On 02 April 2007 Enel, Acciona and Eon entered into an agreement ("the Agreement") by which Enel and Endesa would transfer to Eon a number of rights and assets, including Enel's existing electricity generation, distribution and supply business in Spain via its subsidiary Viesgo (except for its stake in EUFER¹), certain additional Endesa's assets located in Spain, and Endesa Europa (comprising Endesa's current business in Italy, together with related businesses in France, Poland and Turkey).
7. On 31 May 2007, Enel and Acciona notified to the European Commission the proposed acquisition of joint control of Endesa. The scope of such notification was limited to the net assets of Endesa and did not include the assets to be sold on to Eon. On 5 July 2007 the Commission adopted a decision pursuant to Article 6(1)(b) of the Merger Regulation, whereby it (i) established that the proposed operation constituted a concentration with a Community dimension pursuant to Articles 1 and 3 of the Merger Regulation and (ii) declared it compatible with the common market.
8. On October 2008, following the completion of the bid over Endesa, Enel and Acciona have acquired control over Endesa. However, some of the entities belonging to the Endesa group, namely Endesa Italia, and Enel's subsidiary Viesgo, pending the final completion of their sale to Eon, have been held separate from Enel, Acciona and the rest of Endesa and have been operated by an independent trustee, appointed by the parties, which spontaneously offered to do so.
9. On 18 March 2008 Acciona, Enel and Eon concluded another agreement ("the Additional Agreement") whereby they agreed to exclude one of the power plants from the portfolio of Endesa assets to be divested to Eon (the Foix power plant) and also to substitute one power plant (Besos 3) by another one (Tarragona 1). Enel, Acciona and Eon informed the Commission on 2 April and 27 March respectively of the changes introduced by the Additional Agreement.
10. Given that the Additional Agreement entails a modification, other than a simple reduction, of the perimeter of the transaction as previously notified to and cleared by the Commission, the parties have to notify again the transaction.

III. THE APPLICATION FOR DEROGATION

11. Enel and Acciona have requested a derogation from the suspension obligation pursuant to Art 7(3) of the Merger Regulation. This derogation request is based on the need to preserve the parties' possibility to continue to manage Endesa as they have done since

¹ EUFER is a joint venture between Enel and the third Spanish electricity operator Unión Fenosa SA, active in generation of electricity from renewable resources.

the acquisition of control over it. The obligation on the parties to abstain from adopting any strategic decision related to Endesa's business conduct, will result into a paralysis of Endesa's activities and will cause significant damages to Endesa as well as to its parent companies.

IV. THE CONDITIONS FOR A DEROGATION PURSUANT TO ARTICLE 7(3) OF THE EC MERGER REGULATION

12. Pursuant to Article 7(1) of the EC Merger Regulation, a concentration with a Community dimension or one referred to the Commission pursuant to Article 4(5) of the EC Merger Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the EC Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligations imposed in Article 7(1) and (2). In deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

A. THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE EC MERGER REGULATION

13. In its decision of 5 July 2007 the Commission stated that the combined aggregate worldwide turnover of Enel, Acciona and Endesa was above €5,000 million (Enel EUR 38,513 million; Acciona EUR 6,272; Endesa EUR 20,580 million) and their respective aggregate Community-wide turnover was above €250 million (Enel EUR 38,139 million; Acciona EUR [...]; Endesa EUR [...] million). The world-wide and Community-wide turnover figures of the undertaking concerned will not materially change for the purpose of assessing the changes introduced by the Additional Agreement. Moreover, Enel, Acciona and Endesa do not achieve more than two thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension under Article 1(2) of the Merger Regulation.

B. THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES

14. Enel and Acciona submit that the stand still obligation would have adverse effects on Endesa. In particular the obligation on the parties to abstain from adopting any strategic decision related to Endesa's business conduct, will result into a paralysis of even the daily management of Endesa and will cause significant damages to Endesa as well as to its parent companies.
15. According to Article 7(3) of the EC Merger Regulation, a derogation from the suspension obligation should also take into account the possible effects of the suspension on third parties. The Commission has no evidence that the suspension obligation may have adverse effects on any third party.

C. THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

16. The acquisition of control over Endesa by Enel and Acciona has been already assessed and authorised by the Commission on 5 July 2007. The changes to the transaction perimeter introduced by the Additional Agreement do not have any

impact on the competitive assessment carried out by the Commission in the decision adopted on 5 July 2007.

17. Under the terms of the Additional Agreement, as explained above, Enel and Endesa will not transfer to Eon the plant of Foix and will transfer the Tarragona1 plant instead of the Besos3. Both the latter plants are situated in the same area and are technically very similar. Similarly, the fact that Foix will remain within Endesa, and therefore under the control of Enel and Acciona, is unlikely to significantly strengthen Endesa's position on any of the markets on which it is active.
18. Therefore the proposed transaction is not likely to give rise to competition concerns.

V. CONCLUSION

19. Based on the above considerations and in accordance with Article 7(3) of the EC Merger Regulation, Enel and Acciona are granted a derogation from the obligations imposed by Article 7(1) of the EC Merger Regulation.

For the Commission
(signed)
Neelie KROES
Member of the Commission